

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LAWRENCE MILLSAP,

Defendant and Appellant.

A137350

(Lake County
Super. Ct. No. CR926951)

Defendant Robert Lawrence Millsap appeals from a judgment following his no contest plea to causing bodily injury while driving under the influence (DUI) (Veh. Code, § 23153). In addition to his plea to the DUI charge, defendant admitted the two great bodily injury (GBI) enhancements associated with the DUI. The trial court sentenced defendant to a term of seven years four months: 16 months for the DUI conviction and three years for each of the GBI enhancements to be served consecutively to the underlying sentence. Defendant contends the trial court was unaware of, and thus failed to exercise, its discretion in sentencing defendant to consecutive sentences for the two GBI enhancements. Defendant also contends that he was denied the effective assistance of counsel because his trial counsel failed to inform the trial court that it had discretion to dismiss the enhancements or run the sentences concurrently. We affirm the judgment.

I. FACTUAL BACKGROUND

On July 18, 2011, Clearlake police officers responded to the scene of a head-on collision. Upon arrival, they observed a woman, Kathy Trask, trapped inside a small

Dodge Neon that was disabled and severely damaged. Ms. Trask, the front passenger of the vehicle, had blood on her face and appeared to have head injuries. She was unable to exit from the car due to the severe damage to the vehicle. A rear passenger, M.L., a minor, had been removed from the vehicle and was unresponsive. The driver of the Dodge Neon, Christine Lawson, sustained injuries to her back, neck and knees.

A witness told officers he was inside a nearby store when he heard a loud crash, exited the store and observed that a Ford pickup truck had collided with a Dodge Neon. As the witness approached the scene, he saw defendant enter the Ford pickup truck and attempt to leave. The witness tried to pull defendant from the fleeing vehicle, but defendant slammed the door and stated, "I'm pulling over." Defendant fled the scene of the accident and headed towards Redbud Park where his vehicle came to a stop. The police report indicated the Ford pickup truck had sustained major damage, which made it impossible for defendant to proceed any further.

An officer questioned defendant regarding the accident. Defendant had red watery eyes, partly slurred speech and an unsteady gait. The officer also observed a Fentanyl patch on defendant's bicep. Defendant confirmed the patch was Fentanyl and reported he frequently uses Fentanyl for lower back pain. He also added he was taking Lexapro for depression. When the officer asked defendant if he was feeling the effects of the Fentanyl patch, defendant stated, "Yes, it helps with the pain." He also added the patch had been on for approximately two days.

Defendant was placed under arrest for driving under the influence of a controlled substance. The officer instructed defendant to remove the Fentanyl patch. Defendant removed the patch, placed it into his mouth, and began eating it. The officer grasped defendant's face while continuously yelling at him to spit out the patch. Approximately 20 seconds after the struggle began, defendant finally released the Fentanyl patch onto the floor. The chewed Fentanyl patch was taken into evidence. Defendant eventually admitted to possessing the patch without a prescription and told the officer he had also taken half of a Lexapro and a Valium the same day. Defendant also tested positive for marijuana.

A first amended complaint accused defendant of: (1) driving under the influence causing injury (Veh. Code, § 23153); (2) hit and run (Veh. Code, § 20001, subd. (a)); (3) unlawful possession of Fentanyl (Health & Safety Code, § 11350, subd. (a)); and (4) misdemeanor destruction of evidence (Pen. Code,¹ § 135). The amended complaint further alleged as to the DUI that defendant had proximately caused bodily injury to one person and as to both the DUI and the hit and run, that defendant had inflicted great bodily injury on two additional people.

Pursuant to a plea bargain for a maximum term of seven years four months and dismissal of the other charges, defendant pleaded no contest to the DUI and admitted two GBI allegations. The trial court sentenced defendant to a term of seven years four months.

II. DISCUSSION

Defendant asserts the trial court erred in imposing consecutive terms for the two GBI enhancements. Defendant waived this issue by failing to object on this ground in the trial court. It is appropriate to apply the waiver doctrine “to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices.” (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Consequently, “complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.” (*Id.* at p. 356.) Defendant failed to invite the trial court to strike the GBI enhancements or punishment, or to run the terms concurrently. Accordingly, this claim is forfeited. Even if defendant had not waived the issue, the record demonstrates that no error occurred.

A. Trial Court’s Discretion to Dismiss Enhancements

The trial court imposed two GBI enhancements pursuant to section 12022.7. That statute provides in pertinent part: “Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

state prison for three years.” (§ 12022.7, subd. (a).) Despite this general mandatory language, the trial court retains discretion to strike or dismiss the enhancement or the additional punishment under section 1385. (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155.) Defendant contends the trial court did not understand that it had discretion to dismiss the enhancements or the additional punishment.

Defendant’s argument that the trial court mistakenly believed it did not have discretion regarding the GBI enhancements is based on a misguided reading of statements made by the court and counsel at the defendant’s sentencing hearing. While explaining that the district attorney “did give [defendant] a significant reduction” because the prosecutor “did drop” a third GBI allegation that could have resulted in a term of “twelve years in the state prison,” the trial court noted, “[t]he GBI allegations, 12022.7, are mandatory three years each.” Defense counsel then stated his understanding “that there is no argument as to whether those [GBI enhancements] are full term consec or not[;] they simply are by definition.” The court then stated, “[t]hese are enhancements that the Court must impose full term.” From these comments, defendant concludes the trial court misunderstood its discretion.

Despite this statement, the record as a whole does not persuade us that the trial court was unaware of its discretion to strike the section 12022.7 enhancements. The trial court’s comments were correct. The GBI enhancements at issue were three years each as opposed to a single greater term or a triad of possible greater terms. And each enhancement term was “full” as opposed to one-third the term as would be the case for a subordinate count (§ 1170.1, subd. (a)). Also, the three-year terms were “mandatory” terms that “the Court must impose,” as opposed to one of several terms the trial court could choose to impose depending on its view of aggravating and mitigating factors (§ 1170, subd. (b)).

The court did not state, however, that they were not subject to a motion to strike. It is well established that a “trial court is presumed to have been aware of and followed the applicable law” (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496 (*Mosley*)) and that a “ ‘ ‘ judgment or order of the lower court is *presumed correct*[, and a]ll intendments

and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.’ ” [Citation.]’ ” (*In re Julian R.* (2009) 47 Cal.4th 487, 498–499.) “These general rules concerning the presumption of regularity of judicial exercises of discretion apply to sentencing issues.” (*Mosley, supra*, at p. 496; see also *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527 [“[W]e cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of [its sentencing] discretion.”].) This record does not show that the court misunderstood the scope of its discretion. We will not presume it did so.

B. The Trial Court Did Not Have Discretion to Impose Concurrent Terms

Contrary to defendant’s contention, the trial court did not have the authority to order the enhancements to be served concurrently with each other. Section 12022.7, subdivision (a) states that a person who inflicts great bodily injury “*shall* be punished by an *additional and consecutive term* of imprisonment in the state prison for three years.” (§ 12022.7, subd. (a), italics added.) “ ‘ “Shall” is mandatory, . . . “may” is permissive.’ ” (*People v. Reiley* (1987) 192 Cal.App.3d 1487, 1489 (*Reiley*)). Defendant does not cite any statutory or legal authority for the proposition that the trial court had the discretion to impose concurrent terms for the two GBI enhancements. To the contrary, as this court has held before, “*if* multiple enhancements are imposed, they are inherently consecutive rather than concurrent.” (*Reiley, supra*, at p. 1489, original italics.)

C. Defendant Was Not Prejudiced

Even if the trial court misunderstood its discretion, defendant has not demonstrated prejudice warranting a remand. Given the trial court’s assessment that “this is a case that cries out for a harsh punishment,” it is not reasonably probable the court would have exercised its discretion under section 1385 as to one or both of the GBI enhancements. The trial court commented on defendant’s “callous” conduct at the scene of the accident, defendant’s knowledge about the effect the Fentanyl patch and other drugs had on him and the devastating effect the accident had on the three victims. The trial court noted that although it had been nearly a year and a half since the accident, all three of the victims were still suffering and being treated: “I mean, imagine the one

young lady misses a good share of a school year, . . . One victim is still in a wheelchair. . . . [¶] . . . [¶] The other victim still in a cast and still getting surgery” Given the trial court’s view of the seriousness of defendant’s conduct and the damage he had done, it is not reasonably probable the court would impose a lesser punishment if the case were remanded for resentencing.

D. *Ineffective Assistance of Counsel*

Defendant claims he was denied the effective assistance of counsel due to his counsel’s failure to ask the trial court to strike at least one of the GBI enhancements or the punishment for it, or to run the GBI terms concurrently. To prevail on an ineffective assistance of counsel claim, defendant must show that his counsel’s performance fell below professional standards of reasonableness, and that there is a reasonable probability that but for the deficient performance, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*).)

Here, defendant asserts his counsel should have objected to the trial court’s statement that “[t]he GBI allegations, 12022.7, are mandatory three years each” and advocated for the court to dismiss the enhancements, strike the punishment for them or run the terms concurrently. Instead, defense counsel acquiesced in the trial court’s statement. Once again, in claiming ineffective assistance of counsel, defendant has the burden of showing: (1) counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland, supra*, 466 U.S. at p. 687; see also *People v. Williams* (1988) 44 Cal.3d 883, 937 (*Williams*) [recognizing it is the defendant’s burden to establish both deficiency and prejudice].) Accordingly, even if defendant has a legitimate complaint about his counsel’s failure to advocate for dismissal of the GBI enhancements, prejudice still must be shown.

A showing of prejudice requires defendant to demonstrate “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694.) In

establishing prejudice, the defendant “must carry his burden of proving prejudice as a ‘demonstrable reality,’ not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]” (*Williams, supra*, 44 Cal.3d at p. 937.) In this case, defendant has failed to show any likelihood that the trial court would have stricken the GBI enhancements or punishment if his counsel had corrected the court’s comments about the mandatory three-year term. To the contrary, the law and the facts of defendant’s case were known to and considered by the trial court before imposing sentence. Because defendant has failed to show there is a reasonable probability that the court would have reached a different sentencing result if defense counsel had advocated for defendant more effectively, we reject his claim of ineffective assistance of counsel.

III. DISPOSITION

The judgment is affirmed.

Bolanos, J.*

We concur:

Ruvolo, P.J.

Rivera, J.

* Judge of the San Francisco City and County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.